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THE JUDICIARY AND THE ADMINISTRATION OF JUSTICE IN THE PROVINCE OF ONTARIO.

BY

THE HONORABLE WILLIAM RENWICK RIDDELL, LL. D., ETC.,

JUSTICE OF THE SUPREME COURT OF ONTARIO.

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[Upon receiving the invitation to address this Section of the American Bar Association, I prepared a paper on the above subject; but on conversing with a number of my American judicial brethren, I found that certain matters which I thought commonplace were really of much interest to them and *vice versa*. I therefore addressed the Section *extempore*—this paper contains the substance of my remarks, together with certain information brought out by questions sent to me by members of the Association.]

I feel particularly flattered by the invitation given me to address the Judicial Section of the American Bar Association, and equally, if not more so, by the request that I should speak of the judiciary of my own province. I accept in no missionary spirit but in that of fraternity and comradeship—I do not say or suggest that our methods are the better; but I do urge that as you and we and all the English-speaking peoples are one in essence, one in the feeling for justice and law, for the determination of rights on principle and not by the whim and caprice of judge or lord, so each branch of these imperial peoples may benefit by the consideration of how another has attempted to solve problems which are common to all and of the success obtained in the endeavor.

For more than a century our province has been permitted to develop its legal system in its own way, without interference on the part of the mother country, or any other.

For the two years after its organization, the Province of Upper Canada (now Ontario) had four Districts, and in each District a Court of Common Pleas, with full civil jurisdiction in the District. The English civil law having been introduced in 1792 by the first Act of the first Parliament of the province, it was early determined to introduce the English system of courts. Accordingly in 1794, an act was passed creating a common law court,

the Court of King's Bench, with full jurisdiction, civil and criminal, throughout the province and having its seat at the capital. That court was in 1837 and 1849 supplemented by a Court of Chancery and in 1849 by a Court of Common Pleas (with the same power and jurisdiction as the Court of King's Bench). These three were in 1881 combined with the Court of Appeal into a Supreme Court of Judicature now the Supreme Court of Ontario, with full jurisdiction, legal and equitable, civil and criminal.

First, however, I shall speak to you of the Bar; because, according to our system, no man can be a Judge of the Supreme Court of Ontario unless he has been at least ten years at the Bar of Ontario—he cannot be a Judge of the inferior courts unless he has been a member of the Bar of Ontario for at least seven years. In our country, no layman tries any case, no matter how small—a case involving five cents is tried by a Judge who has been appointed a Judge by the Government of the Dominion of Canada for life, and who has been at least seven years at the Bar of Ontario.

The Bar is a self-governing body: the courts do not call to the Bar of Ontario. Every five years (at the present time) the barristers in Ontario cast a vote for thirty men whom they desire to be Benchers, as we call them. Those thirty men, together with some *ex officio* members constitute a body corresponding to the senate of a university and in some respects to a board of governors. They have entire charge of all matters relating to admission to the Bar; they built the law school; they appoint the professors, they appoint the examiners; and when a young man or young woman has passed the examinations satisfactorily, that body calls to the Bar. Then some Bencher presents the successful candidate to a judge in court, as having been called to the Bar by the Law Society of Upper Canada; and thereafter he or she must be recognized by every judge in the Province of Ontario. Since 1797 no court in the Province of Ontario has had or has any power to hear anybody as a counsel or barrister unless he has been called to the Bar of Ontario by the Law Society of Upper Canada.

In addition to our barristers, we have also what are called solicitors, but ours is not entirely like the English system.

Nearly all our barristers are solicitors; practically all our solicitors are barristers. A young man will study law, and prepare himself for the examinations, and then when he has passed the proper examinations he gets a certificate of fitness from the Law Society; and upon that being presented to the court, the court admits him as a solicitor or, as you would call it, an attorney.

The Law Society of Upper Canada has full jurisdiction in the way of discipline over all members of the Bar; and it is exercised very freely—so that I may say, without undue self-laudation, we have a very respectable Bar in the Province of Ontario.

Now, as to the Bench. As at present constituted, we have one supreme court, the Supreme Court of Ontario, which has full jurisdiction, criminal and civil, equitable and legal, over all classes of cases, from the most trifling crime to the most serious crime, and from the most trivial civil claim to the most important. In practice the inferior crimes, practically all except those which are punishable with death—this statement is not literally accurate but is substantially so—are tried by the inferior courts, and, similarly, any civil case involving up to say five hundred dollars is brought as a rule in one of the inferior courts.

Each county or union of counties has its own County Court of limited civil jurisdiction; and it has its own Court of General Sessions of the Peace of criminal jurisdiction. And then there are Division Courts corresponding to your magistrates' courts in the United States, which deal with cases running up to $100. These are presided over by county court judges.

All appeals go to a branch of the Supreme Court of Ontario. The Supreme Court of the Province of Ontario has two branches—one is the High Court Division, a trial branch for the hearing and trial of cases; the other is the Appellate Division, which hears all appeals. But every judge of the Supreme Court has the same power and jurisdiction as any other; any judge may try legal or equitable issues, civil or criminal cases or sit on the hearing of an appeal from any judicial brother. An Appellate Court consists normally of five members but four constitute a quorum (except in criminal appeals). We have only one Court of Appeal for the Province of Ontario. From the

Court of Appeal of the Province of Ontario a very few cases are taken to the Supreme Court of Canada, and a smaller number of cases, perhaps not one per cent, taken over to the Privy Council in England—cases small in number although important in substance.

The practice in the Division Court is very simple indeed. It is laid down by a Board of County Court Judges, subject to the supervision of the Supreme Court Judges. The practice in the County Courts is, *mutatis mutandis*, the same as the practice in the Supreme Court. Accordingly the Justices of the Supreme Court have practical jurisdiction over all the practice in the courts of the Province of Ontario in civil cases. In criminal cases, the Dominion Parliament lays down the practice, and it is exceedingly simple in every particular. Hereinafter I shall speak of this in more detail.

Let me speak first of the practice in civil matters. While in early days the legislature occasionally passed practice statutes of more or less significance, even then the rules and practice were largely in the hands of the judges themselves. For nearly forty years the legislature has not interfered but left them wholly to the judiciary.

Speaking from observation and some experience, I would say that the plan of allowing the judges full control over the practice of the courts works admirably. It is flexible, easily altered or adjusted to meet new conditions and eminently conducive to speedy justice. If a rule works badly it can be changed without delay: if an exigency arises it can be met at once.

Again speaking from observance and experience, the end and aim of the rules of practice have been to give every litigant his rights irrespective of slips and mistakes, and dependent wholly upon the facts of each case without regard to technicality, or to legal astuteness or cunning. We do not regard the courts as merely a forum for the academic discussion of abstruse principles or simply a machinery for elaborating a complete or logical and advanced theory of law, but as a business institution to give the people seeking their aid the rights which facts entitle them to, and that with a minimum of time and money. We are a poor and a busy people, we cannot afford to waste either time or money.

Civil Practice.

In civil cases in the Supreme Court and the County Court, there are two ways of bringing a matter before the court for adjudication. One is by what we call an Originating Notice. That is where the rights of parties depend upon a will or a contract, or any document in writing. In that case, instead of issuing a writ of summons according to the regular practice, some person interested in the determination of that question serves a notice of motion upon the other parties interested and moves it before a judge sitting in Court; the judges sit in court practically continuously, so that there is no difficulty in determining without delay the rights of parties under such a document. This proceeding may be taken before any dispute has arisen concerning the writing in order to prevent any future difficulty. I read the rules:

"600. The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, or any person claiming to be interested in the relief sought as creditor, devisee, legatee, next-of-kin or heir-at-law of a deceased person, or as *cestui que trust* under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may apply by originating notice for the determination without an administration of the estate or trust of any of the following questions or matters:

(a) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next-of-kin or heir-at-law, or *cestui que trust*.

(b) The ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others.

(c) The furnishing of any particular accounts by the executors or administrators or trustees and the vouching (where necessary) of such accounts.

(d) The payment into the court of any money in the hands of the executors or administrators or trustees.

(e) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees.

(f) The approval of any sale, purchase, compromise or other transaction.

(g) The opinion, advice or direction of a judge pursuant to the Trustee Act.

(h) The determination of any question arising in the administration of the estate or trust.

(i) The fixing of the compensation of any executor, administrator or trustee.

"603. (1) Where any person claims to be the owner of the land, but does not desire to have his title thereto quieted under the Quieting Titles Act, he may have any particular question which would arise upon an application to have his title quieted determined upon an originating notice.

"604. Where the rights of any person depend upon the construction of any deed, will or other instrument, he may apply by originating notice, upon notice to all persons concerned, to have his rights declared and determined.

"605. (1) Where the rights of the parties depend:

(a) Upon the construction of any contract or agreement and there are no material facts in dispute.

(b) Upon undisputed facts and the proper inference from such facts.

"Such rights may be determined upon originating notice.

"(2) A contract or agreement may be construed before there has been a breach thereof."

Where the motion is heard by the Judge, Rule 606 directs as follows:

"606. (1) The Judge may summarily dispose of the questions arising on an originating notice and give such judgment as the nature of the case may require, or may give such directions as he may think proper for the trial of any questions arising upon the application.

"(2) Any special directions, touching the carriage or execution of the judgment or order or the service thereof upon persons not parties, may be given as may be deemed proper."

A very great many contested and contentious questions are thus disposed of.

But the regular way of getting a matter before the court is by the issue of a writ of summons. This writ of summons is issued by the plaintiff or plaintiffs, as the case may be, and served upon those against whom a claim is made, the writ being endorsed with the cause of action. We have two kinds of endorsements. One kind, the special endorsement, is employed where the plaintiff seeks to recover a debt or liquidated damages in money and in a few other cases.

Rule 33 provides as follows:

"33. (1) The writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim,

where the plaintiff seeks to recover a debt or liquidated demand in money (with or without interest, and whether the interest be payable by way of damages or otherwise), arising:

(a) Upon a contract, express or implied (as for instance on a bill of exchange, promissory note, cheque, or other simple contract debt); or

(b) On a bond or contract under seal for payment of a liquidated demand; or

(c) On a statute where the amount sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(d) On a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand; or

(e) On a trust; and also

(f) In actions for the recovery of land (with or without a claim for rent or mesne profits); and

(g) In actions for the recovery of chattels.

(h) In actions for foreclosure or sale."

When a writ, being specially endorsed, is served upon the defendant, the defendant if he wishes to defend must not only file an appearance, but with his appearance he must file an affidavit setting out that he has a good defence on the merits and also stating the grounds of his defence; if these grounds are not sufficient they can be struck out and judgment may be entered forthwith. If the alleged facts set out in the affidavit be sufficient to constitute a defence, then the matter goes down to trial, as in other actions: the endorsement upon the writ and the affidavit may if the plaintiff so desires, constitute the pleadings—there is no necessity for any more pleadings than these with a specially endorsed writ, but the plaintiff may, if he prefers, proceed as in other cases.

If the defendant, served with a specially endorsed writ does not enter an appearance, final judgment may be entered; if he files an appearance with the proper affidavit he may be examined as in other actions—the practice of examination will be explained later.

In the case of a mortgage and some other particular forms of action, there are also special methods of procedure that I need not dwell on.

In an action in which the writ is not specially endorsed the defendant enters an appearance but he does not put in an affi-

davit. A statement of claim is served by the plaintiff and in due time a statement of defence is served by the defendant. These statements of claim are simple statements in ordinary language of the facts upon which the plaintiff relies to entitle him to the judgment which he claims—not conclusions of law. So, in the statement of defence, the defendant sets out the facts upon which he relies to constitute a defence to the action, not conclusions of law. If he wishes to admit anything stated by the plaintiff he may admit it; if he does not admit any statement, it is taken as denied (in this differing from the English practice).

When the plaintiff sees the statement of defence, he may amend his statement of claim or file a reply. The defendant may amend his pleading, but no pleading is allowed after reply. The defendant may also, by way of counterclaim, set up any claim he may have against the plaintiff, whether sounding in damages or not: but the court may strike out the counterclaim if it be thought not convenient to try the issues at the same time.

We have also convenient methods of trying counterclaims by the defendant against the plaintiff and other persons—and also a third party proceedings to determine guaranty, relief over, etc.

Any party may move to strike out pleadings or for judgment on the pleadings, etc., but by reason of the simplicity of our pleadings this is not very often done.

Amendments of pleadings are allowed almost as of course at any stage even in the Appellate Division. Our rules in that regard are imperative not permissive—"shall" not "may."

"183. A proceeding shall not be defeated by any formal objection, but all necessary amendments shall be made, upon proper terms as to costs and otherwise, to secure the advancement of justice, the determining the real matter in dispute, and the giving of judgment according to the very right and justice of the case.

"184. Non-compliance with the Rules shall not render the writ or any act or proceeding void, but the same may be set aside, either wholly or in part as irregular, or may be amended, or otherwise dealt with, as may seem just."

These amendments may be made in the proceedings before trial, they may be made at the trial, they may be made in the Appellate Division. Over and over again, in the Appellate Division in which I have the honor to sit, the objection has been taken, "The judgment does not follow the pleadings," and the answer

made: "Very well; we will amend the pleadings to agree with the facts." There may be other facts which would require to be proved under the amended pleadings or other evidence which a party might desire to adduce. If so, we call the witnesses before us in the Appellate Division, and have them examined there; or sometimes facts are allowed to be proved on affidavit.

If the facts are all before the court, we have little care for the pleadings and we care nothing for the "state of the record." Everyone will remember the wail of the technical judge when amendments were suggested—"Think of the state of the record." We care so little about the record that, in a great many cases, the amendments which are ordered to be made are not made in fact.

There is some danger in that course sometimes, if the case is appealed to the Supreme Court of Canada, because the Supreme Court of Canada often looks at the pleadings rather more strictly than we do; I cannot say what is done in the Privy Council, because it is thirteen years since I practiced there.

Again sometimes there is a plea of *res adjudicata;* but we have no real difficulty in such a case, because, if it is said that the judgment pleaded did not proceed upon the formal pleadings, but that the question that was really tried and disposed of was something different, we send for the original record and the original pleadings in that action; and we have the power to amend the pleadings at any time.

I know that sounds very terrible from the point of view of the pure lawyer, of one who thinks of nothing else but law; and indeed if the courts existed solely for the purpose of making good lawyers, pure lawyers' law, that might not be a wise method of procedure. I contend, however, that courts do not exist for the purpose of making good lawyers any more than a hospital exists for the purpose of making good doctors. If a medical student can learn to be a good doctor by attending the clinics in the hospital, well and good. In the same way, if a member of the bar may become a good lawyer by watching the proceedings in a court of justice, well and good. But the object of the court is to give the litigant his rights; and everything else must be secondary to that.

Proceeding now with our action at law. Every litigant must, as of course, file an affidavit, setting out all the documents which

he has in his possession, custody or control, having any bearing whatever upon the matters at issue in the action, or which have been in his possession, and stating when they were in his possession, and what has become of them; and he must produce these to the opposite party if the opposite party so demands. That we have found helps a very great deal in elucidating the facts of an action before it comes to trial.

Then there is another very useful practice—a practice which puts an end to at least one-third, possibly one-half, of all the actions brought. When by the pleadings it has been made manifest what the issues are, which are to be tried, either party may serve upon the other a subpoena requiring him to appear before a Special Examiner (who is an officer of the court), and submit to examination upon all the matters which are to be in issue directly or indirectly in the action. The examination is taken in shorthand and extended; and it may be used at the trial by the person who examines—it cannot, however, be used by the person who is examined. If he wants to tell anything to the jury or the judge, he may go in the witness box and tell it.

That system of compelling parties to put their cards upon the table (so to speak) has helped wonderfully in diminishing the number of actions tried, and in simplifying the actions when they are tried. The admissions of the defendant on the examination for discovery are put in and that will perhaps reduce the matters in issue down to one or two simple facts; whereas, otherwise, there might have been many facts to be proved.

In not a few cases the admissions of one or the other party show that there is no defence or no legal cause of action as the case may be: the party conceiving himself entitled to judgment on admissions may move before a judge in court for such judgment as he thinks he is entitled to.

Now, suppose the pleadings are complete and the case is to be tried, when and how is it to be tried?

The judges of the Supreme Court, every six months, lay down circuits for each of the judges in the High Court Division. Each county or union of counties has a county town, in which a court for the trial of actions is held, twice, four times, six times, eight times a year, according to the amount of business which is to be done. Some of the sittings are non-jury sittings, for the trial of

actions without a jury. Others are jury sittings at which actions are tried by jury, and also actions without jury.

Let me premise my subsequent statements by saying that we have no Constitutional Limitations in the Province of Ontario. The very word "constitution" means something different in the United States from what it means in Canadian or British nomenclature. With you the "Constitution" is a written document, containing so many sentences, words and letters: every man may read it, it is written and *Litera scripta manet*. With us, the constitution means something quite different. The Constitution of Canada is the constitution of the British Empire, of the mother country, of England; it is the body of principles more or less well defined, upon which the people believe they should be governed. It is not something in black and white—you can talk about it, write about it, argue about it—bu t it is not a document for interpretation by court or lawyer. With you, to say that anything is "unconstitutional" is to say that it is illegal however wise and beneficial: with us, to say anything is "unconstitutional" is to say that it is legal, legally binding, but unwise and improper.

Since we have no Constitutional Limitations, we can govern ourselves and do govern ourselves without any more regard to the "wisdom of the ancestors" than we think it deserves. And the legislature many years ago, passed an act placing it in most cases entirely in the hands of the judge whether a case should be tried with or without a jury.

Now, that sounds appalling! Think of that "Palladium of Liberty," the jury, being swept out of existence by the ruthless hand of a judge appointed for life, for whom the people cannot even vote, and whom they cannot displace—we have no recall in our country. This is what happens:

A party who wishes his case tried by a jury files a jury notice—the other side may move to strike it out. It will be struck out in Chambers, if the judge sitting in Chambers thinks it is a case that ought not to be tried by a jury upon the face of it. Usually, however, a different course is pursued and the matter is left to the trial judge: I go circuit, say, as I have done many times, and hope to do again. The Records containing the pleadings are laid before me; I go through the records one by one, and

determine which, if any, of the cases for which a jury is asked should really be tried with a jury. Counsel may be heard; and as a rule in a very few minutes we have determined in which cases a jury is proper. In all the other cases, the jury notices are struck out, and they are placed at the end of the list, with the cases to be tried without a jury. (This applies only to civil cases.)

There are still a very few cases where a party has the right of trial by jury.

Moreover, the judges have the power to strike out a jury at any stage in the case, until such time as the verdict of the jury has been accepted.

And notwithstanding what may have been done by any other judge in the way of striking out a jury notice, and notwithstanding what the parties may desire, the trial judge may try any case with a jury which he thinks should be so tried.

There have been very strong grounds urged for the retention of the jury trial. Such a method is doubtless good in some cases. I cannot, however, agree with Thomas Jefferson in his view that cases ought to be tried by a jury in order to teach the juries and therefore the people at large, law. I do not think that the court is a place for teaching law at all. More than that, in 999 cases out of a thousand, in matters which actually arise in the life of a juryman, he does not need any law, or any rule of guidance except plain common sense and common honesty. Such a knowledge of law as he can acquire by trying a case as a juryman, does not help the ordinary individual very much.

Moreover, I protest against teaching jurors or the body of the people anything at the expense of two litigants. It might be just if the country should pay the expense of the litigants and the lawyers: if business schools of that kind are needed they ought to be kept by the people, and not paid for by the litigants.

There are other objections against our system which might be urged. It may be that the people of a country have not come to that state in evolution or devolution, whichever you like—I am not concerned with the words—I mean such a state of sentiment as that they will approve of the trial of most cases by judges instead of by juries. There are some states, there are some places, Populist and otherwise, in which the people think they ought

to have their cases tried by a jury, even though they are not or may not be tried so well by a jury. Now, if the people are not satisfied to have cases tried by a judge instead of by a jury, they ought to have them tried by a jury. The most important thing is to do justice and right between man and man, to do right and to do justice according to law. There is, however, the second thing, and not very far behind this in importance, which is that the parties shall believe they are getting justice; they shall believe that their case is being properly tried; they shall believe that justice has been done; they shall leave the court satisfied that such is the case—*placoti*, as Lord Finlay put it this morning.

Our people in Ontario have, through a course of evolution, come to the view that, after all, a jury is not necessary in most cases; they have come very much to the mind of the French-Canadians, who, shortly after the conquest by British of our beautiful country in 1759-60, were never tired of expressing their wonder that their businesslike, common-sense, fellow-colonist, the Englishman, preferred to leave his rights to the determination of tailors and shoemakers rather than to that of his judges.

Even if a case is tried by a jury, in not one case in ten—I am quite within the mark—is the jury allowed to give a general verdict. What we do is this: We write out questions for them to answer in writing, as to the facts upon which we conceive the determination of the action will rest. For instance, in a negligence action, it would run something like this: 1. Was the accident in question caused by the negligence of the defendant? 2. If so, what was the negligence? Write out carefully and fully every act of negligence of which you find the defendant guilty, which caused or assisted to cause the accident. 3. Notwithstanding the negligence of the defendant, could the plaintiff by the exercise of reasonable care have avoided the accident? And then there may in some cases be a number of other questions; and in any case the jury find damages. A jury is not allowed to give a general verdict—they have nothing to do with the costs—they answer the questions put to them and these only. The judge accepts the findings of fact and enters the judgment which the answers to these questions entitled the parties to—*i. e.*, not according to his own view of the facts, but according to the facts as found by the jury. If the judge is not satisfied with the

finding of the jury, he has no power to order a new trial; an appeal must be made to the Appellate Division. Sometimes the findings of a jury are so outrageous that they ought not to be allowed to stand; but the trial judge has no power to set them aside; that is one of the functions of the Appellate Division.

The result is there is not one case in one hundred in which there is a general verdict by a jury, except in cases of slander or something of that sort.

The percentage of cases tried by a jury is constantly diminishing—the last time I had occasion to look into the matter at all closely, I found that about 20 per cent were so tried in the Supreme Court, about 15 per cent in the County Court and not one-fifth of one per cent in the Division Court. While technically there is an appeal from the action of a trial judge in striking out the jury, I have, in more than thirty years' experience, known of only two appeals being actually taken on this ground, both of them unsuccessful—I know of one case, however, in which an appeal taken on other grounds succeeded, and the Appellate Court directed the jury notice to be restored.

In an address before the Illinois Bar Association, May 28, 1914, I used the following language in reference to our practice:

"The saving of time—and wind—is enormous. The opening and closing speeches of counsel to the jury and the charge of the judge are done away with; in argument there are very few judges who care to be addressed like a public meeting and quite as few who are influenced by mere oratory—all indeed must *ex officio* be patient with the tedious and suffer fools gladly. Vehement assertion, gross personal attacks on witnesses or parties, invective, appeal to the lower part of our nature, are all at a discount: and in most cases justice is better attained, rights according to law are better ensured. Moreover during the course of a trial a very great deal of time is not uncommonly wasted in petty objections to evidence, in dwelling upon minor and almost irrelevant matters which may influence the jury, wearisome cross-examination and reiteration, etc., all of which are minimised before a judge."

As regards appeals, we have not two courts, as you have in most of your states. Our Supreme Court of Ontario is, in one of its Divisions, the Trial Court, and in the other of its Divisions, the Appellate Court; and any one of the judges of the Supreme Court

may sit in either Division. Today a judge may be sitting in the Appellate Court—presiding, for that matter, in the Appellate Court; tomorrow he may be trying a damage action, and the next day a murder action. Any judge whether chief or puisne justice of the Supreme Court has precisely the same function as any other judge.

There being only the one court, there is no necessity for any formal proceeding to bring the matter up to the Appellate Division. The appellant brings up the record used at the trial: that record is brought up in all its hideous irregularities, if you will, all blotched over with amendments. That is brought up and placed before us—a typewritten copy of all the oral proceedings at the trial is furnished to each of the judges—the original documents are brought up and placed before us. We are precisely in the same position as the trial judge, so far as the written documents are concerned. We have the disadvantage of not seeing and hearing the witnesses; but the trial judge as a rule where his finding depends upon the credibility of the witnesses expresses his opinion; and while we are not bound by his findings, we have it for our guidance.

An appeal must be brought within thirty days after the trial.

If a case is too long on the list, it is a common practice for the Appellate Division to send for counsel and ask why the case is not heard, brought on for argument. In general, if an appeal is not heard within three months of the trial, there is something wrong somewhere; and if a case is not tried within six months of the writ being served, there is something wrong.

Of course, witnesses will die, and accidents will happen—witnesses will leave the country. These are particular instances; but speaking generally, a case ought to be tried within six months after the action is brought, and it ought to be through the Court of Appeal, and the whole action finally settled within a year.

I shall give you a concrete example. In the very first case that I tried when I was raised to the Bench thirteen years ago, which went to the Privy Council, the writ was issued in April in one year: it went through the trial court, through the Appellate Courts and the Judicial Committee of the Privy Council in Westminster, and was disposed of in June of the following year. That is fifteen months to go through the trial court, the

Appeal Court, the Supreme Court of Canada, and the Judicial Committee of the Privy Council.

I do not wish you to understand, or to think that I am trying to give you the impression, that we are marvellously clever in Canada; but this I do urge upon you:

We are a poor people, we are a busy people, we have a big country to develop, we are developing and we must develop it with considerable rapidity. We have no time to waste in technicality in pleadings and such like—we try to save both time and money for all litigants, and to give them their rights and dues within as short a time as possible. As we do not sell, neither do we delay justice.

It is not altogether the practice alone that makes a difference—give me even a complicated practice, with a judiciary possessing the instinct of right and justice and the desire to do business and get on with the work, and I will give you a court which will do a great deal better than a court with the very finest practice, the most modern improvements, but with the judges technical, insisting upon the letter rather than the spirit, form rather than substance, and more troubled about the importance of their position than they are about the importance of the litigant getting his rights.

But there can be no doubt that a simple non-technical and flexible practice makes for justice; and other things being equal it is more advantageous for the people at large, the litigant, the lawyer and the judge himself than the technical, intricate, refined practice which prevails in some jurisdictions which is more concerned with the way in which the lawyer puts things on paper than with the litigant having his rights according to the facts.

Criminal Procedure.

I may be permitted to repeat here what I said to the New York State Bar Association, January 20, 1912:

"At the conquest of Canada by the British, 1759-60, the English criminal law, both substantive and adjective, was introduced by the conquerors, although (with the exception of a few years) the French-Canadians were permitted to retain their own law in civil matters. The English criminal law continued to prevail except as modified by provincial statutes—and these statutes in general closely followed the legislation in the mother

country. This statement also applies generally to the Provinces of Nova Scotia and New Brunswick. Accordingly, at confederation in 1867 the criminal law of all the confederating colonies was almost identical—while the civil law of Lower Canada (Quebec) was markedly different from that of Upper Canada (Ontario), Nova Scotia and New Brunswick, the Lower Canadian law being based upon the Custom of Paris and ultimately upon the civil law of Rome; while that of the others was based upon that of the common law of England. The British North America Act, which created (1867) the Dominion of Canada, gave to the Parliament of the Dominion jurisdiction over the criminal law, including the procedure in criminal matters. The provinces, however, retained jurisdiction over the constitution of the Courts of Criminal Jurisdiction.

"For some years there were statutes passed from time to time amending the criminal law; and at length Sir John Thompson who had been himself a judge in Nova Scotia, and was Minister of Justice of Canada, brought about a codification of criminal law and procedure. He received valuable assistance from lawyers on both sides of the House; and the Criminal Code of 1892 became law. This with a few amendments made from time to time is still in force.

"The distinction between felony and misdemeanor has been abolished, and offences which are the subject of indictments are 'indictable offences.' Offences not the subject of an indictment are called 'offences' simply. Certain offences of a minor character are triable before one or two justices of the peace as provided by the Code in each case. In such cases there is an appeal from a magistrate's decision adverse to the accused to the County Court judge both on law and fact; or the conviction may be brought up to the Appellate Division of the Supreme Court on matter of law.

"Cases triable before justices of the peace are (for example) resisting the execution of certain warrants, persuading or assisting an enlisted man to desert, challenging to fight a prize-fight or fighting one, or being present thereat, carrying pistols, selling pistols or air guns to minors under 16, pointing pistols, stealing shrubs of small value, injuring Indian graves, buying junk from children under 16, etc.

"But offences of a higher degree are indictable.

"If a crime, say of theft, is charged against any one, upon information before a justice of the peace, a summons or warrant is issued—and the accused brought before the justice of the peace. In some cases he is arrested and brought before the magistrate without summons or warrant; but then an information is drawn up and sworn to. The justices of the peace are appointed by the Provincial Government and are not, as a rule, lawyers.

"Upon appearance before the justice of the peace, he proceeds to inquire into the matters charged against the accused; he causes witnesses to be summoned, and hears in presence of the accused all that is adduced. The accused has the fullest right of having counsel and of cross-examination, as well as of producing any witness, and having such evidence heard in his behalf as he can procure. All the depositions are taken down in shorthand or otherwise, and if in long hand signed by the deponent after being read over to him.

"After all the evidence for the prosecution is in, the magistrate may allow argument, or he may *proprio motu* hold that no case has been made out—in which case the accused is discharged—or he may read over aloud all the evidence again (unless the accused expressly dispenses with such reading), and address the accused, warning him that he is not obliged to say anything, but that anything he does say will be taken down and may be given in evidence against him at his trial, and asks "Having hear the evidence, do you wish to say anything in answer to the charge?" Then if desired by the accused, the defence evidence is called.

"If at the close of the evidence the magistrate is of opinion no case is made out, he discharges the prisoner, but the accused may demand that he (the accuser) be bound over to prefer an indictment at the court at which the accused would have been tried if the magistrate had committed him.

"If a case is made out, the accused is committed for trial with or without bail, as seems just, the witnesses being bound over to give evidence.

"Police magistrates are appointed for most cities and towns, who are generally barristers; these have a rather higher jurisdiction than the ordinary justice of the peace; in some cases with the consent of the accused.

"The courts which proceed by indictment are the Supreme Court of the Province and the General Sessions.

"The Supreme Court can try any indictable offence; the Sessions cannot try treason and treasonable offences, taking, etc., oaths to commit crime, piracy, corruption of officers, etc., murder, attempts and threats to murder, rape, libel, combinations in restraint of trade, bribery, personation, etc., under the Dominion Elections Act.

"Within twenty-four hours of committal to gaol of any person charged with any offence which the Sessions could try, the Sheriff must notify the County Court judge (who acts as judge in the Sessions) and with as little delay as possible the accused is brought before the judge. The judge reads the depositions, and tells the prisoner what he is charged with and that he has the option of being tried forthwith before him without a jury or

being tried by a jury. If the former course is chosen, a simple charge is drawn up, a day fixed for the trial and the case then disposed of.

"If a jury be chosen, at the Sessions or the Supreme Court (Criminal Assizes), a bill of indictment is laid before a grand jury (in Ontario of thirteen persons) by a barrister appointed by the Provincial Government for that purpose. The indictment may be in popular language without technical averment, it may describe the offence in the language of the statute or in any words sufficient to give the accused notice of the offence with which he is charged. Forms are given in the statute which may be followed. Here is a sample:

"'The Jurors of Our Lord the King present that John Smith murdered Henry Jones at Toronto on February 13th, A. D. 1912.'"

"No bill can be laid before the grand jury by the crown counsel (without the leave of the court) for any offences except such as are disclosed in the depositions before the magistrate; but sometimes the court will allow or even direct other indictments to be laid.

"The grand jury has no power to cause any indictment to be drawn up.

"We do not allow an examination of the proceedings before the grand jury—there is no practice of quashing indictments for irregularities before the grand jury, insufficiency of evidence or the like. The grand jury is master in its own house; it may call for the assistance of the crown counsel or proceed with investigations without him, and no shorthand or other notes are taken of the proceedings, the grand jurymen are sworn to keep 'the king's secrets, your fellows' and your own.'

"Upon a true bill being found, the accused is arraigned; if he pleads 'not guilty' the trial proceeds.

"He has twenty peremptory challenges in capital cases; twelve if for an offence punishable with more than five years' imprisonment, and four in all other cases—the crown has four, but may cause any number to stand aside until all the jurors have been called.

"I have never, in thirty years' experience, seen it take more than half an hour to get a jury even in a murder case—and I have never but once heard a juryman asked a question.

"In case of conviction, the prisoner may ask a case upon any question of law to be reserved for the Appellate Division or the judge may do that *proprio motu*. The Appellate Division may also direct a new trial upon the ground that the verdict is against evidence; but I have never known that to be done.

"No conviction can be set aside or new trial ordered even though some evidence was improperly admitted or rejected

something was done at the trial not according to law or some misdirection given, unless, in the opinion of the Appellate Division some substantial wrong or miscarriage was thereby occasioned at the trial. If the Appellate Division is unanimous against the prisoner, there is no further appeal; but if the court is divided, a further appeal may be taken to the Supreme Court of Canada. I have never known this to be done but once.

"A wife or husband is a competent witness in all cases for an accused. He or she is compellable as a witness for the prosecution in offences against morality, seduction, neglect of those in one's charge and many others. The accused is also competent, but not compellable in all cases. If an accused does not testify in his own behalf, no comment can be made upon the fact by prosecuting counsel or the judge.

"No more than five experts are allowed on each side.

"I have never known a murder case (except one) take four days—most do not take two, even with medical experts."

And if a murderer is not hanged within a year of his deed he may properly complain of being deprived of his rights under *Magna Charta*—"We shall not delay justice" was the king's promise.

I venture to hope that some of my brother judges in this great Republic may derive some benefit from what I have said.

Let me repeat, I am not a missionary nor do I urge any change in any system of practice but my own—I only state facts as they are within my knowledge in the hope that they may not be wholly without benefit to others.

I cannot close without expressing my gratitude for the illuminating judgments of many of the judges of the United States and State courts which have cast a ray of light over many a dar' path and assisted us Canadian judges to do justice according to law.

And I feel deeply the cordiality with which you have received me and my message—I am wholly confident that you and we must remain in friendship and harmony as our countries have for more than a century—and that our sympathy with and affection for each other must increase as we know each other better.